No. 48332-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BA&C PROPERTY MANAGEMENT, LLC, a Washington Limited Liability Company,

Appellant,

Vs.

CITY OF LAKEWOOD,

Respondent.

BRIEF OF RESPONDENT CITY OF LAKEWOOD

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I. INTRODUCTION

This action arises from a dangerous building abatement proceeding conducted under the authority of chapter 35.80 RCW by the City of Lakewood against property owned by BA&C Property Mgmt. ("BA&C").

There is no dispute that the property in question is a public nuisance. BA&C has already conceded as much. At a hearing in 2014 involving this property held before the City's Building Official, BA&C Property Mgmt. readily "acknowledged the conditions and stated that [it] did not disagree that the structures violated codes" – a determination which was memorialized in a written determination directing abatement of that nuisance. (CP 26, FF 5). Its own architect added at that hearing that the property needed "extensive work," and an evaluation was needed to "see if it is even possible to save the building and bring it up to code." (Id., FF 6).

Given that BA&C has acknowledged that its property is a nuisance, it begs the question why this case was even brought, much less why it is on appeal. BA&C was ordered to demolish several structures on the property and submit plans detailing the demolition or repair of another, and given deadlines for the performance of these acts. (CP 30). It chose not to appeal this determination. Instead, months after all deadlines set forth in the determination had passed, it alleges to have submitted building

plans for one of the structures, which it claims Lakewood refused to accept or process. (CP 5, ¶ 2.17). But it doesn't elaborate why Lakewood should have processed them.

Its principal contention in seeking judicial review of both abatement order and the denial of a building permit, via a statutory writ of review under chapter 7.16 RCW is BA&C's claim that the parties had reached a "settlement." But there was no "settlement," as claimed by BA&C. Regardless of this, as a wholly legal matter, because BA&C sought review via statutory writ, and the decisions for which it seeks review are not amenable to review via writ of review, the Pierce County Superior Court correctly dismissed this matter for lack of jurisdiction and correctly denied the appellants' motion for reconsideration. BA&C's attempt to belatedly recast its claims as one for mandamus does not alter this outcome. The decision below should be affirmed and Lakewood awarded its fees and costs for this appeal.

II. RESTATEMENT OF FACTS

BA&C Property Management is the owner of a property located at 9704 South Tacoma Way, Lakewood. (CP 26; FF 4).[1]

[1] All references to "FF" in this Brief refer to the Findings of Fact entered by the City of Lakewood Building Official and memorialized in a June 16, 2014 *Findings and Order*. A copy of the *Findings and Order* appears in the record at Clerks Papers (CP) 25-31.

Following inspections upon this property in August 2012 and April 2014 involving the City of Lakewood, West Pierce Fire & Rescue and others, the City of Lakewood's building official made a preliminary determination that this property was unfit for human habitation or other uses and a public nuisance. (CP 25; FF 1). A hearing was held in May 2014 on the City's claims that the property constituted a dangerous building. (CP 26; FF 4). At the hearing, Mr. Chung – BA&C's principal and sole member – acknowledged these conditions and did not disagree with the claims that the structures violated code. (CP 26; FF 5). Indeed, at the hearing, Mr. Chung acknowledged that many of the additions were performed without permits, engineering or professional design. (CP 29; FF 9). Further, these buildings so clearly violated building code that it would be nearly impossible for these additions to meet codes. (CP 29; FF 9). Mr. Chung was offered the opportunity following the hearing – but before issuance of an order – to develop a detailed work plan to remedy these defects. (CP 29-30; FF 10). No plan was ever submitted. (Id).

These proceedings culminated in a *Findings and Order* dated June 16, 2014 directing abatement of this property. Among other conditions, the Findings and Order directed (in part) as follows:

- Submit complete applications for permits to demolish or repair the buildings 30 days from the date of the order.

- Demolish and remove various mobile homes and other additions to the building two months from the date of the order;
- Demolish the Warehouse/Office Building two months from the date of order or complete repairs no later than 60 days after permits issued as otherwise directed by the Building Official.

(CP 30-31).

Consistent with RCW 35.80.030, BA&C Prop. Mgmt. was appraised of its right to appeal this determination. (CP 31). Following expiration of the appeal deadline, and having received no appeal, Lakewood wrote to BA&C requesting access and informing BA&C of its intent to begin demolition and cleanup of the property. (CP 112-113). As the then-assigned Code Enforcement Officer assigned to this case noted, the City did not afford BA&C any additional time; instead, any delay was to place this abatement in the queue with other properties and to get the abatement process underway. (CP 106-107, ¶ 8).

In December 2014 – several months after all deadlines specified in the Findings and Order had expired, BA&C submitted an application for a building permit. (CP 5, ¶ 2.17). BA&C claims this permit was not accepted or processed. (Id). It then petitioned the Pierce County Superior

Court for the issuance of a writ of certiorari under chapter 7.16 RCW. (CP 1). In its petition it claimed that a settlement was reached resolving both the dangerous building abatement and criminal charges pending against BA&C principal, and that (ostensibly) pursuant to that "settlement" BA&C submitted a revised building permit applications which were rejected. (CP 3-5, ¶¶ 2.8 - 2.18).

On Lakewood's motion, the Pierce County Superior Court dismissed this action. (CP 58-59). Lakewood argued that under the time constraints set forth in RCW 35.80.030 the writ of review was untimely sought and any attempt to seek review of the building official's rejection of any permit application was an attempt to improperly collaterally attack the earlier June 2014 Findings and Order.[2] (CP 10). Lakewood also submitted materials (discussed more fully below) directly refuting any notion of a "settlement," as claimed by BA&C.

BA&C sought reconsideration of this determination. (CP 60). This motion was likewise denied by the superior court. (CP 119-120).

[2] Lakewood also argued a third ground: that the writ petition was not verified. This issue was resolved with the filing of the sworn verification. (CP 32).

III. ARGUMENT

A. BA&C Has Failed to Properly Preserve the Appellate Record and Comply with the Rules of Appellate Procedure.

Hindering meaningful appellate review are two critical defects which permeate BA&C's appellate briefing: (1) there are no citations to the record; and (2) BA&C has apparently shifted its theory of the case. In view of either of these considerations, this Court should decline to consider the merits of BA&C's claims.

In its appellate briefing, BA&C fails to provide this Court with a single citation to the record, or perform any meaningful analysis. The failure to do so is typically fatal to appellate consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). RAP 10.3(a)(5) mandates that each factual statement contain a reference to the record. "The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court." *Lawson v. Boeing Co.*, 58 Wn.App. 261, 271, 792 P.2d 545 (1990). The sole attempt at providing a "citation," to the record appears in a footnote (Brief of App. at p. 3, fn. 1), but it lacks a reference to the Clerks Papers itself. This Court has recognized such citation shortcuts to be improper. *Keiffer v. Seattle Civil Serv. Comm'n*, 87 Wn.App. 170, 172 n.1, 940 P.2d 704 (1997).

BA&C also changes its theory of relief before this Court. Claiming that it "mis-titled," its petition, it now advances a new theory that it is entitled to relief under either the writ of prohibition or writ of mandamus.[3] (Br. of App. at p. 5 fn. 2). Before the trial court, it unequivocally sought a writ of review. It plead claims for the statutory writ of review. (CP 1-7). It sought an order of default on this ground. (CP 8-9). When Lakewood pointed out that the Petition was not verified, and sought dismissal on this basis (CP 15); BA&C then verified its Petition. (CP 32). BA&C defended against Lakewood's motion under a writ of review framework. (CP 33-39). And, it sought reconsideration. (CP 60 (Motion), 114-116 (Reply Brief)). If it believed that mandamus or prohibition were proper, it had multiple opportunities while this case was in the trial court, both before and after final judgment, to abandon claims for a writ of review and seek claims under one of these other writs.

Our Supreme Court has been emphatic on this point, "[a] case will be considered in this court only on the same theory upon which it was presented in the trial court." *Browning v. Johnson*, 70 Wn.2d 145, 152, 422 P.2d 314 (1967). That same year, the Supreme Court also stated:

> In a plethora of decisions, involving many varying situations, this court has steadfastly adhered to the rule that

[3] Acknowledging that these are two separate writs, simply for ease and brevity, because the writ of prohibition is the counterpart to the writ of mandamus, throughout this brief, we refer to both claims simply as "mandamus." *See*, RCW 7.16.290.

> a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. The trial court must have an opportunity to consider and rule upon a litigant's theory of the case before this court can consider it on appeal.

Bellevue Sch. Dist. v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)(citations omitted).

Ordinarily, an appellate court should not resort to the Rules of Appellate Procedure to avoid addressing the merits of an appeal. In this case, the defects are glaring. The appellant readily concedes that it has elected to change theories on appeal. It does not address the trial court's actual decision, and seeks reversal on a "decision," which the trial court never had the opportunity to make. And, nowhere in its brief does it supply a citation to the Clerks Papers in support of a single factual allegation. It's noncompliance with the rules are more than mere technicalities; they prevent and hinder meaningful review of the actual decisions made by the trial court.

B. The Superior Court Properly Dismissed the Case.

In its original Petition, appellants' claim was seemingly directed to two decisions of the Building Official: (1) the June 2014 Findings and Order (CP 5 ¶ 3.1 (second)); and (2) a December 2014 denial of a permit

application (CP 6, ¶ 3.5). On appeal, however, it limits its claim solely to the December 2014 denial.[4]

To seek review of these determinations, it applied for a statutory writ of review under chapter 7.16 RCW. In this context, it fails to demonstrate how the trial court's decision is improper. "The courts recognize three methods of appeal from administrative decisions: direct appeal expressly authorized by statute[;] review pursuant to a statutory writ of certiorari, RCW 7.16.040; and discretionary review pursuant to the courts' inherent constitutional powers." *Kreager v. WSU*, 76 Wn. App. 661, 664, 886 P.2d 1136 (1994)(citing, *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693, 658 P.2d 648 (1983))(footnoted citations omitted). Writs and direct appeals are distinct means of obtaining limited appellate review of a judicial or quasi-judicial action. *Coballes v. Spokane County*, 167 Wn. App. 857, 865, 274 P.3d 1102 (2012). But, a writ petition and an appeal are not the same. *Id.*; *see also, Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 768, 261 P.3d 145 (2011)(noting that writ proceedings are not a substitute for an appeal).

The issue of whether a court has jurisdiction to issue a statutory writ of review is a question of law subject to de novo review. *Newman v.*

[4] The trial court actually issued two orders. Its order of dismissal is dated September 25, 2015. (CP 58-59). BA&C sought reconsideration, which was denied in an October 30, 2015 Order. (CP 119-120). However, it only assigns error to the September 2015 decision. (Brief of App. at p. 2).

Veterinary Bd. of Governors, 156 Wn.App. 132, 140, 231 P.3d 840 (2010). A writ of review (whether statutory or constitutional) is an extraordinary remedy that should be granted sparingly. *Coballes v. Spokane Cty.*, 167 Wn. App. 857, 865, 274 P.3d 1102 (2012).

In order to obtain a statutory writ of review, the petitioner must demonstrate several factors: "(1) an inferior tribunal or officer (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no other avenue of review or adequate remedy at law." *Clark Cty. Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 845, 991 P.2d 1161, (2000).

In this case, the trial court concluded that an essential element was missing because BA&C failed to utilize the proper processes to challenge the various decisions from which it now claims it was aggrieved. "The absence of a right of appeal or plain, speedy, and adequate remedy at law is recognized as an essential element of the superior court's jurisdiction to grant a statutory writ of review." *Coballes*, 167 Wn.App. at 866. If any one factor necessary to secure the writ is absent, "then there is no jurisdiction for superior court review." *Newman*, 156 Wn.App. at 140.

On appeal, BA&C does not even attempt to argue how the trial court's decision was wrong under the framework applicable to writs of review. The decision below should be affirmed.

1. BA&C Does Not Acknowledge the Theory Argued to the Superior Court.

BA&C sought judicial review of the June 2014 Findings and Order which was issued under the authority of chapter 35.80 RCW. However, it failed to exhaust the review process provided by RCW 35.80.030. Because there was a statutory right of review, to the extent that it seeks to belatedly challenge revisit this decision, a writ does not lie to seek review of the June 2014 Findings and Order or the December 2014 determination.

The process of seeking judicial review in the context of a chapter 35.80 RCW dangerous building abatement involves several distinct processes, each triggering a right of appeal. This Court has outlined the general process as follows:

> Under RCW 35.80.030 an improvement board[5] cites the owner of the premises to a hearing to determine whether a structure is unfit for use, and if so, the nature of corrective action which the owner must undertake. Demolition is one option. If the Board determines the structure unfit and specifies corrective action, the owner may appeal to an appeals commission and ultimately to the courts. If the owner does not appeal from the initial determination, the order is final, and a copy of the order is filed with the county auditor.

Pierce Cty. v. Schwab, 48 Wn.App. 418, 423, 739 P.2d 116 (1987).

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[5] The statute also permits a "Public Officer," to carry out the functions of the improvement board. RCW 35.80.020(4); RCW 35.80.030(1)(c). And, appeals may be heard by an existing municipal agency. RCW 35.80.030(1)(g). In Lakewood, these functions are carried out by the City's Building Official and Hearing Examiner, respectively. BA&C's briefing confuses these two potential decisionmakers and treats them as one.

Judicial review must be sought an aggrieved person has the right to appeal to superior court within thirty days following the Hearing Examiner's decision. RCW 35.80.030(2).

Following the exhaustion of administrative appeals, and barring an injunction from the superior court, the abatement order may be carried out. *Id.*; *see also, Everett v. Unsworth*, 54 Wn.2d 760, 344 P.2d 728 (1959)(municipality may abate nuisances without resort to courts where administrative processes are available). The process contemplated by chapter 35.80 RCW "does not impair or limit in any way the power of the municipality to define and declare nuisances and to cause their removal or abatement, by summary proceedings or otherwise." RCW 35.80.030(6).

Below, Lakewood argued that the December 2014 decision was subject to review by its Hearing Examiner under the then-existing provisions of its municipal code[6] and that this appeared to be a collateral attack on the June 2014 determination. Under both versions of the Code, BA&C had a right to right of appeal or plain, speedy, and adequate remedy at law which would have merited denial of a writ of review.

[6] During the pendency of this appeal, as part of the 2015 updates to the International Building Code, Lakewood passed Ordinance 641. Under both the former code and current code, appeals from the Building Official are appealable to the Hearing Examiner. *See e.g.*, Lakewood Muni. Code 15A.5.060(G); Former Lakewood Muni. Code 15A.32.060.

BA&C has never made a prima facie showing of why it failed to comply with this process or how the Superior Court erred in determining that it lacked relief via extraordinary writ. To the contrary; the writ was untimely sought to seek review of a decision for which there was already a right of direct review. This case was properly dismissed because a necessary element to give jurisdiction to a claim for a statutory writ of review was missing. BA&C does not argue otherwise.

2. BA&C's Change of Theory on Appeal Does Not Warrant Relief From This Court.

What BA&C does argue is an entirely new theory that was not presented to the trial court. To the extent that BA&C claims it is now seeking review of a building permit denial in December 2014 on alternate theories, this Court should reject these attempts.

Mandamus requires a different showing and analysis than a statutory writ of review. To obtain a statutory writ of mandamus, courts have identified three necessary elements to support the issuance of a writ: (1) "the party subject to the writ is under a clear duty to act;" (2) the applicant has no "plain, speedy and adequate remedy in the ordinary course of law;" and (3) the applicant is "beneficially interested." *Eugster v. City of Spokane*, 118 Wn.App. 383, 402, 76 P.3d 741, 753 (2003)(citing, RCW 7.16.160; RCW 7.16.170). Appellate review of a

decision issuing a writ of mandamus is dependent on the question reviewed. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 648, 310 P.3d 804 (2013). Whether there is a duty to act is a question of law subject to de novo review, while the issue of whether there is an adequate remedy at law is a question left to the trial court's discretion, subject to an abuse of discretion standard. *See id.*

Because BA&C's mandamus claim arises for the first time on appeal, there is no analysis offered before either the trial court – or, for that matter, this court – to aid an evaluation of these factors. BA&C does not outline how there was a duty on the part of Lakewood to act. Nor does it suggest how one of these other writs are an appropriate remedy.

Whatever duties BA&C claims Lakewood owes cannot be established from this record. Underlying this litigation is BA&C's allegations that there was a "settlement." But BA&C has never supplied the trial court any record to contend that, either within the chapter 35.80 RCW context or outside of it, Lakewood was obligated to process it December 2014 building permit application. Moreover, BA&C fails to illustrate how (as with their claims underlying the statutory writ of review) that other extraordinary writs are warranted in this case. We touch on these issues below.

BA&C failed to create a record to even show what it believes is the "settlement," much less establish as a legal matter how this entitles it to relief via any statutory writ. The burden is on the party seeking to enforce a settlement to prove there is no genuine dispute regarding the existence and material terms of a settlement agreement. *In re Ferree*, 71 Wn.App. 35, 41, 856 P.2d 706 (1993). The preferred way of establishing the existence of a settlement is by affidavit or declaration. *Id.*, 71 Wn.App. at 72. While the issue of a settlement is one which is frequently resolved on summary judgment, *see id*; even factual matters implicating issues of law are subject to judicial resolution via declarations or other testimony. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 19 n.10, 829 P.2d 765 (1992)(discussing concept in context of exhaustion of administrative remedies).

A claim of a purported settlement, although of concern to any party in litigation, takes on added importance in the dangerous building context. Upon commencement, the dangerous building complaint shall be recorded with the county auditor, and the complaint "shall have the same force and effect as other lis pendens notices provided by law." RCW 35.80.030(1)(c). A final abatement order is also subject to filing with the county auditor. RCW 35.80.030(1)(f). Thus, any claim of "settlement," affects not just the interests of the governmental entity adjudicating the

abatement, but also affects those who might otherwise have an interest in this land.

Hindering any real analysis is that BA&C has offered multiple and inconsistent accounts of what it claims is the purported "settlement," reached by the parties. In the Petition, BA&C claims that the "global settlement," relative to "all properties owned by [BA&C] and William Chung," was reached on July 10, 2014 and links this "settlement," to a then-pending criminal case in the Lakewood Municipal Court. (CP 3 ¶ 2.9; *see also*, CP 3 ¶ 2.10; CP 4, ¶¶ 2.13, 2.16; CP 5 ¶ 3.1 (second) (using same date)). It also claims in the first paragraph of its brief to this Court that there is an order issued on this date by the Building Official. (Brief of App. at p. 1). The record does not support BA&C's claims.

Nearly two years before the instant dangerous building matter, in May 2012, Lakewood filed a criminal charge was filed against Mr. Chung, individually, for violations occurring at a separate property (12020 Gravelly Lake Drive). (CP 48-49). To resolve that case, Mr. Chung entered a stipulated order of continuance (SOC) in May 2013 whereby he agreed to waive certain rights in the anticipation of a possible dismissal of the criminal charge. (CP 50-54); *see also, State v. Ashue*, 145 Wn.App. 492, 501, 188 P.3d 522 (2008)(discussing general framework of pretrial diversion agreements). But the dangerous building proceeding underlying

this proceeding was commenced almost a year later in April 2014 (CP 25; FF 2, 3).

Mr. Chung did not comply with his obligations under the SOC, and on November 18, 2013, the SOC was revoked, he was tried on stipulated facts, and convicted. (CP 55). The municipal court, however, entered a deferred sentence. "A sentence is 'deferred' when the court adjudges the defendant guilty but stays or defers imposition of the sentence and places the person on probation." *State v. Carlyle*, 19 Wn. App. 450, 454, 576 P.2d 408 (1978). If a criminal defendant successfully completes the term of the deferred sentence, the guilty finding is withdrawn, and a dismissal entered. RCW 3.50.320.

The criminal case was indeed dismissed on July 10, 2014, but not because of any settlement as BA&C alleges. The order of dismissal expressly states that the dismissal was because of successful completion of the deferred sentence. (CP 56). Had the dismissal been the product of a settlement, the municipal court likely would have indicated as much and its order would have stated that its dismissal was based on motion of one or both of the parties. *See id.*

Putting this timeline in the proper context underscores the fact that the entire premise of BA&C's lawsuit, regardless of how it opts to style it, is without merit. The "settlement," if there is one, is the May 2013 SOC

which resolved Mr. Chung's criminal matter. The SOC is silent on any dangerous building processes. The facts underlying the criminal case, and the SOC itself were clearly known by the May 21, 2014 dangerous building hearing. In any event, Lakewood had conducted an additional inspection in April 2014 detailing that the property remained dangerous. Thus, if there were an alleged "breach," of any "settlement," BA&C does not show how this could not have been raised as a defense within the dangerous building administrative process and why it was necessary to resort to an extraordinary writ.

Beyond the claims of whether these was a "settlement," BA&C has failed to demonstrate why Lakewood was obligated to accept and process its building permit application. Mandamus may be available to direct the issuance of a building permit but only if there is a "clear right" to the permit. *R/L Assoc. v. Seattle*, 61 Wn.App. 670, 674, 811 P.2d 971 (1991). But nothing in this record illustrates that there is such a right.

The determinations affecting the property at issue arise under the processes set forth in chapter 35.80 RCW. In the chapter 35.80 RCW context, there is scant case law.[7] The *Findings and Order* imposed certain acts to be performed by certain deadlines. It is undisputed that BA&C

[7] A LEXIS search using "RCW 35.80" for Washington cases reveals eight cases (including one federal case). Only two of those cases are published and neither is of assistance in answering the questions posed here.

never satisfied the deadlines set out in that order. On its face, it cannot be said that Lakewood was under a duty to do anything but refuse to accept this application.

But even outside the chapter 35.80 RCW framework, mandamus will lie to issue a building permit if there is no administrative remedy to exhaust, or if those avenues have been exhausted. *R/L Assoc.*, 61 Wn.App. at 674. BA&C has never made a showing that this issue was ripe for any writ. As discussed above, it had ample administrative remedies via an appeal to the City of Lakewood Hearing Examiner. The existence of an administrative appeal which is not exercised, such as one to a Hearing Examiner, is usually fatal to mandamus relief. *Id.*, 61 Wn.App. at 674. And, it has never filed the alleged applications with any tribunal so as to allow a determination of whether the application was complete.

BA&C's belated claims for a writ of prohibition also fail for similar reasons. As this Court recently stated, "[a] writ of prohibition is a drastic measure that may be granted only if (1) the official is acting in the absence or excess of jurisdiction, and (2) there is an absence of a plain, speedy, and adequate remedy in the course of legal procedure. The absence of either condition precludes the issuance of the writ." *Ames v. Pierce Cty.*, 194 Wn.App. 93, 107, 374 P.3d 228 (2016), *pet. for review*

filed Wash. Supreme Ct. Case No. 93428-2 (July 29, 2016)(internal citations and textual alterations omitted). The writ is available to "arrest," the improper exercise of administrative powers, but is not available when the "only allegation is that the actor is exercising jurisdiction in an erroneous manner." *Id.*

The record is insufficient to establish either requirement and the trial court had no opportunity to evaluate this theory. BA&C has now expressly acknowledged that it "does not seek review of the administrative order[.]" (Brief of App. at p. 1). An unappealed chapter 35.80 RCW order is final. *Schwab*, 48 Wn.App. at 423. Hence, BA&C cannot claim that Lakewood lacked "jurisdiction," to issue the determinations that it made. And, as repeatedly stressed above, it chose not evaluate whether the remedies are inadequate, and thus, it cannot claim that the trial court erred by failing to consider a theory which was not presented to it.

Although a mandamus case, worth repeating as apropos to the case at bar is Division I's conclusion in *R/L Assoc.*,

> Because so little information has been developed at the administrative level, we are unable to discern what the City would deem adequate to satisfy the requirement of [the municipal code]. Until we know what the City does consider adequate, the courts are unable to evaluate the reasonableness of the City's position. We therefore require exhaustion of the remedies provided by the City not only to further the policies underlying the exhaustion doctrine, but

> also as an essential predicate to effective, accurate judicial review.

61 Wn.App. at 677-78.

* * *

Given the inadequacy of the appellate record and its change in theories, BA&C has not made, because it cannot make, the showing that it is entitled to any form of relief. This Court should affirm the decisions below in full.

C. Lakewood Requests Attorney Fees on Appeal.

In accordance with RAP 18.1 and RCW 35.80.030(h), the City of Lakewood requests its attorney fees on appeal.

RCW 35.80.030(h) provides, in part, for the recovery of those costs associated with the "repairs, alterations or improvements; or vacating and closing; or removal or demolition," of the property at issue. The statute does not clarify what allowable "costs," might be. By Code, the City of Lakewood has sought to fill this gap and provide for reimbursement of public salaries where such abatement work is performed by staff, including (as in the case at bar) in-house counsel:

> For purposes of this section, the cost of vacating and closing shall include ... (iii) all other reasonable expenses, including but not limited to, the costs of staff time, materials, incidentals, mailing, publishing, and recording notices. ...

Lakewood Muni. Code 15A.5.090(M)(part); Former Lakewood Muni. Code 15A.34.100(B)(part)(Emphasis added).

Where a municipal code provision authorizes an award of fees, under RAP 18.1, this Court properly awards such fees to a prevailing municipality. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 363, 96 P.3d 979 (2004).

On one hand, this Court has consistently held that attorney fees for appellate-level work must be requested before the Court of Appeals; in the absence of an "express delegation, the appellate court retains its authority over the award of appellate fees and parties must seek such fees in the appellate court." *See e.g., Thompson v. Lennox*, 151 Wn.App. 479, 488, 212 P.3d 597 (2009). On the other hand, the costs of abatement (and thus, the fees requested here) are assessed against the real property at issue. *See*, RCW 35.80.030(1)(h). If this Court concludes that this request comports with the long-standing principles noted in *Thompson*, Lakewood is prepared to comply with RAP 18.1(d). Alternatively, if this fee request is denied, we ask that this Court clarify that any incurred fees may then be taxed against the real property at issue following abatement.

Regardless of this Court's determination on reasonable attorney fees, Lakewood seeks costs under Title 14 RAP payable directly by BA&C.

CONCLUSION

For the foregoing reasons, the decision of the Pierce County Superior Court should be affirmed.

DATED: September 12, 2016.

Heidi Ann Wachter,
City Attorney, City of Lakewood.

By: _____
Matthew S. Kaser, WSBA #32239
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on:

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The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

EXECUTED this 12th day of September, 2016 at Lakewood, Washington.

_____
Matthew S. Kaser

LAKEWOOD CITY ATTORNEY

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